

NO. 42718-4-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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PUGET SOUND CRAB ASSOCIATION, et al.,

Appellants,

v.

STATE OF WASHINGTON and DEPARTMENT OF FISH AND  
WILDLIFE,

Respondents.

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**RESPONDENTS STATE OF WASHINGTON'S AND  
DEPARTMENT OF FISH AND WILDLIFE'S RESPONSE TO  
APPELLANTS' OPENING BRIEF**

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## I. INTRODUCTION

Respondents State of Washington and Washington Department of Fish and Wildlife (hereafter DFW or Department) ask this court to affirm the superior court's determination that DFW did not act arbitrarily or capriciously in amending its Puget Sound summer recreational crab regulation to add one day of weekend harvesting.

DFW is charged with managing a multitude of commercial and recreational fisheries. This substantial undertaking is guided by a set of broad objectives set forth in RCW 77.04.012. Commercial and recreational harvesting of Puget Sound Dungeness crab are two of the fishery activities managed by DFW.

In 2011, after a nine-month policy review, DFW amended WAC 220-56-330, which established the season for the Puget Sound recreational crab fishery. The Appellants (hereafter, "commercial crabbers") challenged one aspect of that rule revision – the addition of a fifth day of harvest on Sunday each week during the summer season.<sup>1</sup> The commercial crabbers' fundamental claim is that the rule revision is arbitrary and capricious because DFW predicted it might produce a roughly 50/50 annual sharing of Puget Sound Dungeness crab by commercial and recreational harvesters, instead of the roughly 68/32

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<sup>1</sup> Thursday through Monday from July to Labor Day, instead of Wednesday through Saturday during that period.

percent share that had been produced in recent years. They make two main arguments in support of their claim.

First, the commercial crabbers argue that any reduction in the percentage of crab taken by commercial interests in favor of recreational harvesters is inconsistent with the portion of RCW 77.04.012 specifying that “the department shall seek to maintain the economic well-being and stability of the fishing industry in the state.” They read RCW 77.04.012 narrowly, interpreting the phrase “fishing industry” to reference only commercial interests – even though the legislature expressly excised the word “commercial” from the statute in 1983 and stated that its intention was to put commercial and recreational interests on an equal footing.

Second, the commercial crabbers argue that when the Department is faced with the task of deciding how to split limited fishing opportunities between commercial and recreational interests, its only option is to take action that will ultimately “enhance and improve” the catch of *both* groups. The Department declined to adopt that interpretation because it would require an impossible undertaking – as the commercial crabbers admit, the crab resource is finite and the number of recreational crab fishers has been increasing, so the Department cannot simultaneously increase the quantity of crab available to both groups. It would be error to interpret RCW 77.04.012 to compel an impossible task.

The trial court properly construed RCW 77.04.012 as a broad and general set of guiding principles that affords DFW considerable discretion to weigh and balance the interests of both the recreational and commercial fishing interests in this state. The statute does not guarantee, or lock in place, any specific fishing outcome for any segment of the fishing industry. Finding that DFW carefully evaluated and considered all of the information presented to the agency in the rulemaking record and acted in accordance with the broad principles set forth in RCW 77.04.012, the trial court rejected the commercial crabbers' challenge to DFW's recreational crab fishery rule. This Court should affirm that decision.

## **II. COUNTER-STATEMENT OF THE CASE**

This case focuses on the Department's exercise of statutorily-delegated discretion to determine how to conserve Puget Sound Dungeness crab, while structuring a fishing season that provides competing interest groups an opportunity to harvest a portion of the resource. Within the past decade, the number of recreational crab harvesters has increased substantially while the number of Puget Sound commercial Dungeness licenses has remained steady. Administrative Record (AR) 19. Fortunately, the harvestable surplus of Puget Sound Dungeness crab has also increased over time, but the demand for harvestable crab always exceeds the supply. Total harvest must be limited

to conserve the resource and avoid its depletion. Accordingly, as the commercial crabbers acknowledge, it is a zero sum management landscape: increased harvest by one group of fishers necessarily reduces the harvest available to other groups.

On April 11, 2011, DFW finalized a rule revising WAC 220-56-330. AR 4.<sup>2</sup> The rule opened personal use (i.e., recreational) crab fisheries in Washington starting July 1, 2011. The revised rule implements a new crab policy for Puget Sound Dungeness crab adopted by the Fish and Wildlife Commission in October 2010. <sup>3</sup>AR 1. The principal outcome of that policy, and the heart of the dispute over the implementing rule challenged here, is the addition of one additional day of weekend fishing for recreational harvesters during the summer season (ending in September).

**A. Management of Puget Sound Dungeness Crab**

Harvest management planning for the Puget Sound crab resource is undertaken annually in cooperation with Indian tribes that have a treaty right to harvest up to 50 percent of the harvestable crab. Because of natural fluctuations in the crab resource, each year is different. Biologists from DFW and the tribes work together to set an initial harvest share of

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<sup>2</sup> A copy of the rule is in Appendix 1.

<sup>3</sup> The Department of Fish and Wildlife (DFW) is comprised of the Fish and Wildlife Commission (Commission) and an agency head – the Director of the Department. RCW 77.04.020.

crab. Because there is no reliable way to definitively predict crab abundance each year, a management allocation is agreed upon using the best evidence available; the allocation is revisited as the year progresses and harvest information is reported. The conservation strategy limits harvest based upon sex, size, and season, with the presumption that all male crabs over a certain size can be harvested outside the molting season. AR 2, 10. The initial state/tribal allocation provides a checkpoint to make sure the state and tribe fish to roughly equal levels with adjustments being made as various initial fisheries are completed, catch is recorded, and test harvests ascertain whether additional crab remains available for harvest. AR 30, 37, 1455-57.

The tribes regulate harvesting by their fishers and the State sets seasons to provide harvest opportunity for state-licensed recreational and commercial fishers. None of these three harvest groups like to fish at the same time. Accordingly, the State and tribes work to coordinate the order of their fisheries – usually a limited tribal harvest first, then summer months for state recreational harvesters, and then fall/winter months for state licensed commercial harvesters who are generally occupied in other fisheries during summer months. AR 37, 1457. Winter recreational harvest opportunity is sometimes provided if there is sufficient crab available. AR 7, 36.

**B. Overview of the Policy and Rulemaking Dimensions of this Case**

This case focuses on one part of the Department's response to a significant increase in the number of recreational fishers over the past decade who desire to fish for Puget Sound crab during the summer months, especially on weekends. That factor, together with other issues affecting the crab fishery, led the Department to begin a review of its existing Puget Sound crab management policy, which was last adopted in 2000. AR 6.

DFW's 2000 crab policy sought to provide a "meaningful harvest opportunity" to recreational harvesters. AR 31-36. Starting in 2002, regional targets were set to evaluate whether this objective was being met for the recreational component of the Puget Sound crab fishery. AR 33. The target amounts reflected the average recreational harvest from 1996 to 2000. AR 31, 1470. From 2002 to 2010, these targets were never adjusted for crab abundance, which increased substantially over time, nor for the fact that the number of recreational harvesters was also on the rise. AR 39, 1470.

During the 10 years between 2000 and 2009, implementation of the Department's 2000 Puget Sound crab policy produced a roughly two-thirds/one-third sharing of Puget Sound Dungeness crab between

commercial and recreational harvesters respectively.<sup>4</sup> AR 1456, 1473. With the number of recreational harvesters on the increase, their collective harvest often exceeded the static harvest targets derived from pre-2001 harvesting activity. AR 43, 1470. Increasing abundance of crab in more recent years has also contributed to higher recreational harvest, but has also provided increased harvest for all fishery sectors, including the State's commercial harvesters. AR 38-39. As the number of recreational harvesters grew, DFW placed more and more restrictions on the recreational harvest activity in an effort to limit the total recreational take to the harvest targets. AR 20. Over time, DFW set shorter recreational fishing seasons and reduced the daily recreational catch. AR 20, 1470. DFW undertook more substantial efforts to monitor the in-season catch and to improve its measurements of how fast the recreational catch was occurring. The legislature also required more specific and detailed recreational licenses and catch reporting. AR 19-20.

Increasingly over time, both the commercial and recreational sectors of the Puget Sound crab fishery expressed discontent with the 2000 policy. AR 7, 20, 1332. Recreational harvesters felt that the season structure (which produced less than a 50 percent take of the Puget Sound

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<sup>4</sup> The percentage of Dungeness crab taken by recreational harvesters is substantially smaller if all Dungeness crab taken by state harvesters statewide is considered. AR 75.

crab) was unfair. They also disliked the shortened season, reduced days, and reduced daily catch limits that had been imposed in an effort to preserve a winter recreational season. Commercial harvesters viewed the static harvest targets for the recreational fishery as a cap on recreational harvesting, which they believed was being violated – even though the 2000 policy never stated that the targets were an effort to cap recreational harvest. AR 20. In addition, a 2010 report by the State Auditor’s Office recommended a clarification of the agency’s crab policy addressing both the allocation of harvest opportunity between the two fishery sectors and conservation issues. AR 42, 1446, 1471.

As outlined in the Concise Explanatory Statement (CES) filed with the Office of the Code Reviser when WAC 220-56-330 was adopted, the Department’s 2010 revision of its crab management policies considered all these issues and provided a new path forward for management of the Puget Sound Dungeness crab fishery. AR 7, 1332-35. The revised general policy statement began with two core directives: “promote a healthy and sustainable population of Dungeness crab in Puget Sound,” and “provide for meaningful and stable recreational and commercial fisheries and to focus the commercial fishery in the areas where the crab abundance is the greatest.” AR 1.

Because Puget Sound provides protected waters for the small boats generally used by recreational crabbers, and considering the increasing recreational interest in this Puget Sound fishery, the policy then established a base summer recreational fishery of five days per week, including weekends, from July through Labor Day, with a five crab per day catch limit. AR 1.

The policy also envisions a base winter recreational fishery from October to December that would be open seven days per week. However, the CES clarifies that fall/winter fisheries will only be opened after further consideration in a rulemaking process that evaluates summer harvest. AR 9. Fall/Winter Puget Sound recreational and commercial Dungeness harvesting was opened in 2011 using separate emergency rules that have not been challenged. *See* WAC 220-56-33000J (winter recreation); WAC 220-52-04000F (commercial).<sup>5</sup>

Nine more specific policy guidelines are also set forth in the revised policy, most of which call for measures to be implemented that will improve conservation efforts. AR 2, 10-13, 1335-40. The ninth policy guideline discusses sharing of the resource between recreational and commercial sectors of the fishery. AR 2-3. Sharing is managed on a

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<sup>5</sup> Because of the need to respond to the harvest levels and resource abundance actually observed during the management season, recreational and commercial fisheries are typically opened and/or adjusted within a management season using emergency rather than permanent rules.

regional basis and within certain regions on the basis of specific bays and harbors where protected waters and locations provide unique harvest opportunities. The objective is to implement a base recreational season, which commences first in time during the year, and then the commercial season, which occurs later in the year when harvesters typically return from Alaska. AR 3, 7, 1457. In the course of implementing the commercial season, the Department's objective is to maximize the *ex vessel* value<sup>6</sup> of the commercial harvest. AR 3.

With regard to sharing of Puget Sound Dungeness crab, the 2010 policy abandons the previous static target for the recreational fishery. The previous target was calculated using average harvest by a smaller number of recreational harvesters during the 1996 to 2000 time period, and it had never been adjusted to reflect changing harvester demographics and crab abundance data. AR 1-3. The policy and implementing rule for the recreational fishery added one more weekend day per week, but maintained the daily catch limit of five crabs. AR 4, 6. The 2010 Crab Policy and CES articulate the Commission's determination to review the crab fishery data annually and reevaluate management options as necessary. AR 2, 14.

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<sup>6</sup> Commercial harvest is tracked with fish tickets that includes information on the wholesale sales price obtained by the commercial harvester – the *ex vessel* value. WAC 220-69-230(1)(v),

The heart of the commercial crabbers' complaint is that adding one more day of recreational crabbing takes crab from them in an amount they claim will produce devastating economic effects. CP at 6 (Pet. at 1, 2, 7, 11, 14). The information the Department compiled during the rulemaking process led the Department to a different, less dramatic conclusion. AR 1096-97 (attached as Appendix 2).

Using the inflation adjusted *ex-vessel* value of commercial harvest from 2005 to 2009 as a guide, the Department estimated that the annual reduction in commercial harvest in the future might be around 442,000 pounds or \$5,000 per licensee. AR 1096; Tr. of Dec. 14, 2010 Meeting at 25, ll. 6-8 (part of filed record). Significantly, the consumer price index-adjusted *ex vessel* harvest value was not predicted to dip substantially below the average of the commercial harvest value obtained in prior years. AR 16, 1097. On this basis, the Department felt it was reasonable to set a recreational season that might produce roughly equal shares of crab for both the recreational and commercial sectors.

### **III. ARGUMENT**

#### **A. Standard of Review**

##### **1. Review of agency rules under the Administrative Procedure Act (APA), RCW 34.05.**

The sole issue presented by this case is whether DFW's adoption of WAC 220-56-330 was properly undertaken pursuant to the rulemaking

statutes and DFW's statutory authority. The commercial crabbers have a substantial burden to overcome the presumption that DFW's rule is valid. RCW 34.05.570(1)(a); *Ass'n of Wash. Bus. v. Dep't of Revenue*, 155 Wn.2d 430, 437, 120 P.3d 46 (2005).

Where the legislature has vested an agency with the discretion to adopt rules, they are presumed valid and may only be invalidated based upon compelling reasons demonstrating that they conflict with the intent and purpose of the legislation. *Armstrong v. State*, 91 Wn. App. 530, 958 P.2d 1010 (1998). The Administrative Procedure Act (APA) further clarifies this inquiry. A court may declare a rule invalid only if it determines that the rule: (1) violates constitutional provisions; (2) exceeds the statutory authority of the agency; (3) was adopted without compliance to statutory rule-making procedures; or (4) is arbitrary and capricious. RCW 34.05.570(2)(c); *Ass'n of Wash. Bus.*, 155 Wn.2d at 437.

The commercial crabbers assert the Department acted arbitrarily and capriciously in adopting the challenged rule revision. Under the arbitrary and capricious test, a court will not set aside a discretionary decision of an agency absent a clear showing of abuse. *ARCO Prods. Co. v. Wash. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 888 P.2d 728 (1995). "Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court

may believe it to be erroneous.” *Rios v. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002). Moreover, “[i]n reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” RCW 34.05.574(1); *Rios*, 145 Wn.2d at 501-02 n.12. Indeed, the court’s job is to review the record to determine if the result was reached through a process of reason, “not whether the result was itself reasonable in the judgment of the court.” *Rios*, 145 Wn.2d at 501. Furthermore, reviewing courts accord particular deference to an agency’s determinations when they are based heavily on factual matters, especially those which are complex or involve agency expertise. *Rios*, 145 Wn.2d at 501-02 n.12.

## **2. Construction of Statutes.**

Part of this rule challenge involves the proper construction of RCW 77.04.012. That is a question of law this Court reviews *de novo*. *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If the statute’s meaning is plain on its face, this Court must give effect to that plain meaning as the legislature’s expressed intent. *Id.*

Because words alone are often an empty vessel if not placed in context, the Court in *Campbell & Gwinn* clarified that the plain meaning

rule includes not only the ordinary meaning of the words themselves, but the underlying legislative purposes and closely related statutes to determine the proper meaning of the statute in proper context. *Id.* at 11 (“meaning is discerned from all that the legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.”).

If the statute remains susceptible to more than one reasonable meaning after applying the plain meaning analysis, it is considered ambiguous. At that point, the court may resort to aids of construction. *Campbell & Gwinn* at 12, 43 P.3d 4.

**B. DFW’s Summer Recreational Crab Rule (WAC 220-56-330) was the Product of a Rulemaking Process that Applied Legislative Directives and Carefully Evaluated the Rulemaking Record**

The commercial crabbers’ challenge to WAC 220-56-330 contains two components – a claim that the rule is legally invalid because it is inconsistent with the provisions of RCW 77.04.012<sup>7</sup>, and a claim that the rule is arbitrary and capricious because the Department either ignored record materials or gave them improper consideration.<sup>8</sup>

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<sup>7</sup> See commercial crabbers’ Br. of Appellant, § 3, Issues Pertaining to Assignments of Error, issues 1-3.

<sup>8</sup> See commercial crabbers’ Br. of Appellant, § 3, Issues Pertaining to Assignments of Error, issue 4.

The superior court correctly concluded that DFW's adoption of WAC 22-56-330 was consistent with RCW 77.04.012, and it rejected the commercial crabbers' argument that the statute assures them a fixed share of harvestable crab. The superior court also correctly concluded that the Department carefully and reasonably considered all of the record materials assembled during the agency rulemaking process.

**1. DFW is charged with managing state fishery resources and has been given broad guidelines to follow when considering how to accommodate competing interests.**

The legislature charged DFW with the responsibility to manage state fish and wildlife resources, in RCW 77.04.012, and with the authority to adopt rules governing the time, place and manner for harvesting those resources, in RCW 77.12.047.

To guide DFW in its management of state resources, the legislature enacted RCW 77.04.012. The portion of that statute most directly at issue in this case provides that:

*The department shall conserve the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair the resource. In a manner consistent with this goal, the department shall seek to maintain the economic well-being and stability of the fishing industry in the state. The department shall promote orderly fisheries and shall enhance and improve recreational and commercial fishing in this state.*

RCW 77.04.012 (emphasis supplied). See Appendix 3 for full text.

Accordingly, the Department's overarching mandate is to *conserve* the public's natural resources. The three other objectives are subordinate to this conservation objective. When conservation of a particular resource is assured, the Department may provide harvest opportunities and, in doing so, must work to "maintain the economic well-being and stability of the fishing industry in the state" . . . "promote orderly fisheries" . . . and "enhance and improve recreational and commercial fishing in this state." RCW 77.04.012.

In addition, RCW 77.04.055(1) provides that DFW "shall maximize fishing, hunting, and outdoor recreational opportunities compatible with healthy and diverse fish and wildlife populations."

Importantly, no special emphasis is placed upon commercial fisheries over recreational fisheries in any of these statutory provisions.

**2. DFW appropriately applied the RCW 77.04.012 duty to "enhance and improve" fishing in the state. (Response to commercial crabbers' First Issue Statement)**

The commercial crabbers first argue that, as a matter of law, DFW's adoption of WAC 220-56-330 is inconsistent with the directives in RCW 77.04.012 to "enhance and improve recreational and commercial fishing in this state." Br. of Appellant at 28-32. According to their view, once conservation concerns are satisfied, DFW is precluded from taking

any management action unless it improves the situation for commercial and recreational harvesters alike.

The Department views its duty to “enhance and improve recreational and commercial fishing in this state” as a broad state-wide goal to be pursued by considering the interests of all fishing groups, taking into account regional considerations and the unique circumstances presented by each fishery. For example, salmon fly fishers in river systems prefer catch and release programs. To provide a meaningful recreational experience for these river fisheries, a certain number of fish must be allowed to escape ocean commercial fisheries, even though this escape is viewed as “wasted” fish by commercial fishers whose interest is in harvest, not catch. Some state fisheries are exclusively for recreational fishers (e.g., Hoh River steelhead) and some are almost exclusively commercial (e.g., coastal Dungeness crab).

In short, the Department has always managed state fisheries with the view that its duty to “enhance and improve recreational and commercial fishing” is a collective obligation with flexibility to establish and adjust harvesting opportunities to serve many and varied fishing interests and to respond to the changing needs of the State’s citizens.

**a. DFW has no duty to guarantee commercial crabbers any specific allocation of crab.**

The commercial crabbers sought an order from the superior court that would require DFW to establish a fixed share of Puget Sound Dungeness crab for commercial harvesters equal to the amount they had obtained in recent years and constrain recreational harvest to ensure this commercial share is obtained. CP at 20. Because such “action” can only be accomplished by rulemaking, their claim for relief is necessarily premised on the argument that DFW has a duty to enact a rule that provides the specific harvest outcomes they seek. This kind of claim has been rejected numerous times by Washington’s courts.

Fishery resources are owned by the State, not by private citizens. RCW 77.04.012 (“Wildlife, fish, and shellfish are the property of the state.”). Accordingly, commercial fishers have no property interest in state fishery resources. *See Marincovich v. Tarabochia*, 114 Wn.2d 271, 276, 787 P.2d 562 (1990) (“fishermen cannot assert a property right over the fish until they are caught”); *Wash. Kelpers Ass’n v. State*, 81 Wn.2d 410, 415, 502 P.2d 1170 (1972), *cert. denied*, 411 U.S. 982, 93 S. Ct. 2274, 36 L. Ed. 2d 959 (1973) (“in regulating the fisheries, the state is merely enacting legislation concerning its own property”); *Vail v. Seaborg*, 120 Wash. 126, 131, 207 P. 15 (1922) (“The fact that appellant and others are engaged in the business of taking fish does not give them any property in the fish prior to taking. The right exists in the state in the first place to say whether any fish whatever shall be taken.”).

The commercial crabbers rely on *Weikal v. Wash. Dep't of Fisheries*, 37 Wn. App. 322, 679 P.2d 956 (1984). Nothing in that case affirms any right to a share of state crab resources. The case upheld the State's limited entry licensing format for commercial harvesters, concluding that it survived constitutional scrutiny because it has a rational basis in preserving the crab resource and avoiding an overcapitalized fleet that might be harmed by fluctuations in the quantity of crab. *See, e.g.*, Laws of 1980, ch. 133, § 1 (codified as a note to RCW 77.70.110) (potential for crab depletion with an increasing number of commercial harvesters). The limited entry licensing format approved in *Weikal* is not a guaranteed allocation of crab; it is a limitation on the number of fishery participants that Washington will license.

The commercial crabbers refer to other portions of Title 77 to support their claim that no change in their percentage share is permitted. Specifically, they claim that the legislature enacted a limited entry license system in 1980 that “require[s] WDFW to ‘maintain’ 125 [commercial] licenses in the Puget Sound Dungeness crab fishery.”

It would be more accurate to say that a license limitation system was enacted in 1980 to address proliferating commercial crab harvesters – a situation that would have both conservation concerns with corresponding economic concerns from an overcapitalized fleet that might bloom,

overharvest, and then collapse. There was a ban on the issuance of new licenses in 1980, but no provisions for reducing fishing gear or the number of licenses deployed. Laws of 1980, ch. 133, § 4. Gear and license reduction measures were introduced in 1982 and 1997 through the introduction of a capped number of licenses – first set at 200 and then later reduced further to 125. Laws of 1982, ch. 157, § 1; Laws of 1997, ch. 115 § 1. The legislative history demonstrates gear reduction was going to be obtained by license attrition. Part of the motivation for the gear limitation program was to enhance the prospects that federal money for a license buy-back program would be made available. CP at \_\_\_\_ (Ex A to DFW’s response trial brief).

Legally speaking, there is not a requirement to maintain 125 licenses. Notwithstanding the ban on issuance of new licenses, DFW “*may* accept applications for new licenses” if the number of licensees falls below 125 in order to maintain that level of licenses. RCW 77.70.100(6) (emphasis supplied). There is no duty to accept new license applications.

Factually speaking, as Plaintiffs acknowledge, there are 160 license holders with 249 licenses – well above the number of licenses

contemplated.<sup>9</sup> AR 19. Even if the 125 license criteria were viewed as some freestanding objective to be maintained, there is plenty of room for attrition of licensed gear.

The commercial crabbers also point to statutory enactments in 2004 that modified part of RCW 77.32.430 dealing with recreational catch reporting claiming that these provisions “strengthen the preseason allocation and mange-to-target system” they allege was part of DFW’s prior crab policy. Br. of Appellant at 30.<sup>10</sup> However, nothing in the legislation mandates or refers to any specific recreational allocation of crab. The legislation facilitates gathering of catch information (subsection 1), establishes a crab endorsement for the recreational fishery license with a special fee (subsection 2), and targets revenue from the new fee for “the sampling, monitoring, and management of catch associated with the Dungeness crab recreational fisheries” (subsection 5). This statute is about enhancing accounting of the catch allocated to the recreational segment not about mandating allocation shares between commercial and recreational sectors of the fishery.

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<sup>9</sup> Because Puget Sound Dungeness crab licenses can be transferred to other license holders, “license stacking” – more than one license per license holder – is possible. This may be desirable where a gear holder faces pot limits imposed per license and wants to set more gear than allowed by a single license. The point is that the desired gear reduction was tied to an attrition of previously issued licenses.

<sup>10</sup> DFW’s Counterstatement of the Case refutes the commercial crabbers’ claim that DFW’s prior crab policy established firm recreational targets vis a vis the commercial sector. The targets were goals set to provide the recreational sector with a “quality fishery experience.”

**b. The commercial crabbers' proposed interpretation of the duty to "enhance and improve recreational and commercial fishing" disregards multiple interests relating to the State's fisheries.**

As noted above, the commercial crabbers' argument erroneously assumes a continuing entitlement to the average percentage share of crab they were able to obtain in the decade from 2000 to 2009 (roughly 60 percent of Puget Sound Dungeness crab). Nothing in RCW 77.04.012 establishes an entitlement to any specific percentage or amount. Furthermore, even if this statutory provision somehow locked into place a pre-existing harvest percentage, they fail to explain why the percentage share should be determined by that 10-year average as opposed to the share that may have existed when the directive was either first enacted in 1975<sup>11</sup> or last amended in 1983.<sup>12</sup> The more rational interpretation of RCW 77.04.012 is that it sets forth broad objectives and confers discretion on DFW to determine how to implement them, rather than locking the State into a specific management regime or specific harvest outcome for one segment of one fishery.

Ultimately, the statutory direction to "enhance and improve recreational and commercial in this state" creates a tension that DFW is directed to resolve. In a zero sum fishery, no sector gains without another

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<sup>11</sup> Laws of 1975, 1st Ex. Sess., ch. 183, § 1.

<sup>12</sup> Laws of 1983, 1st Ex. Sess., ch. 46, §5.

sector losing. Accordingly, refining seasons to address changing demographics and abundance of fish almost inevitably increases harvest shares for some within the fishery and decreases it for others. The commercial crabbers ignore the tension between recreational and commercial sectors of this zero-sum fishery, and argue that the agency must take only those actions that improve things for everyone. Br. of Appellant at 28-29. That is an impossible task where the fishery resource is finite. There simply are not enough crabs for everyone to get more. It was not error for the Department to reject an interpretation of RCW 77.04.012 that would be impossible to implement.

**3. The text and structure of RCW 77.04.012 support DFW's interpretation of "fishing industry" to include economic interests associated with recreational harvesting. (Response to commercial crabbers' Second and Third Issue Statements.)**

The commercial crabbers argue that DFW is foreclosed from considering recreational interests along with commercial interests when evaluating whether its rule is consistent with the directive to "maintain the economic well-being and stability of the fishing industry in the state." The trial court properly rejected that argument.

Recreational fishers purchase vessels, gear, and related supplies when they engage in harvesting activity, and these allied industries all provide economic benefits to the State's economy. AR 16, 1480. Accordingly, it was entirely reasonable for DFW to consider these fishing-

related support industries alongside the consideration that DFW gave to the commercial fishing industry. AR 14-15.

The text and structure of Title 77 supports this approach. RCW 77.04.012 specifies that DFW should work to “enhance and improve recreational *and* commercial fishing in this state” (emphasis added). RCW 77.04.055(1) provides that DFW “shall maximize fishing, hunting, and outdoor recreational opportunities compatible with healthy and diverse fish and wildlife populations” without giving any special priority or exclusivity to commercial interests.

Applying the principle that the plain meaning of a statute is ascertained, in part, from the context of associated statutes, *Campbell & Gwinn*, 146 Wn.2d at 11, these statutory provisions show that the legislature considered both recreational and commercial fishers to be important segments of state fisheries.

Moreover, the 1983 session law enacting the language being construed here demonstrates, on its face, that the legislature did not intend for the phrase “fishing industry” to be narrowly applied to only the commercial sector. In 1983, House Bill 278 modified the provisions of what is now RCW 77.04.012.<sup>13</sup> The word “commercial” was struck from the phrase “~~commercial~~ fishing industry.” Laws of 1983, 1st Ex. Sess., ch. 46, § 5 (attached as Appendix 4). The statute thus unambiguously requires that DFW “seek to maintain the economic well-being and stability of the

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<sup>13</sup> At the time, this statutory language was contained in RCW 75.08.012.

fishing industry” for all fishery segments not just the commercial segment.

Notwithstanding the legislature’s clear intent not to limit its directive just to the commercial segment, the superior court concluded that the phrase “fishing industry” is capable of various interpretations and thus potentially ambiguous. VRP 51-54, Oct. 7, 2011. If this Court also finds the phrase to be ambiguous, it may resort to aids of construction, including legislative history, to ascertain legislative intent. *Campbell & Gwinn* at 12, 43 P.3d 4. Legislative history supports DFW’s interpretation of the statute. For example, a January 31, 1983, memorandum to members of the House Natural Resources Committee describes the 1983 session law as “giving commercial and recreational fisheries co-equal status.” The digest of rewritten provisions similarly describes section five of the legislation as “giving commercial and recreational fisheries co-equal status in [the] Department’s management goals.”<sup>14</sup>

In addition, because DFW is an agency with expertise in fisheries management to whom the legislature has delegated responsibility for implementing RCW 77.04.012, DFW’s interpretation of that statute is entitled to deference unless it conflicts with the statutory scheme in some manner. *See, e.g., Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 593, 90 P.3d 659 (2004). DFW interprets RCW 77.04.012 as directing it to maintain the economic well-being and stability of the recreational fishing industry, and allowing it to consider the economic

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<sup>14</sup> CP at 315 (State’s Resp. to Pls.’ Mot. for Prelim. Inj., Declaration of William C. Frymire, Ex. C (certified copies of legislative history maintained in State Archives)).

stability of support industries that are interconnected with recreational fishing. That interpretation is consistent with the language and history of RCW 77.04.012, and it is entitled to judicial deference.<sup>15</sup>

**4. When adopting WAC 220-56-330, the Department carefully considered the rulemaking record and did not act arbitrarily and capriciously. (Response to commercial crabbers' Fourth Issue Statement.)**

The commercial crabbers offer a laundry list of complaints over the manner in which the agency evaluated its decision to set the structure of the summer recreational crab fishery in Puget Sound.

However, in order to sustain an argument that the agency's rulemaking was "arbitrary and capricious," the crabbers must do more than simply offer up different ways to evaluate the evidence or complain that other evidence should have been gathered and evaluated in a different manner. An action is "arbitrary and capricious" only if it is "willful and unreasoning and taken without regard to the attending facts and circumstances." *Wash. Indep. Tel. Ass'n*, 148 Wn.2d 887, 905, 64 P.3d 606 (2003). The commercial crabbers' claim of arbitrary and capricious rulemaking fails where all they do is offer alternate viewpoints on how to evaluate the record or claim that the agency should have undertaken other forms of analysis. *Hahn v. Dep't of Ret. Sys.*, 137 Wn. App. 933, 942 155 P.3d 177 (2007) ("[E]vidence balancing is not only improper on appeal, it is expressly prohibited during review of an agency action alleged to be

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<sup>15</sup> The commercial crabbers' brief alleges in its Statement of the Case that DFW's interpretation of the law is "new" but offers no citation to the record in support of that factual allegation.

arbitrary or capricious.” citing to *Rios*, 145 Wn.2d at 504 (“neither the existence of contradictory evidence nor the possibility of deriving conflicting conclusions from the evidence renders an agency decision arbitrary and capricious”).

**a. DFW has not failed to assess or plan for the future of the Puget Sound crab fishery.**

The commercial crabbers argue that DFW ignored the increasing number of recreational harvesters and established a priority harvest regime for that sector that will eventually destroy the commercial sector. Br. of Appellant at 43-44. But DFW expressly took into account both the changed demographics of recreational harvesters and the increased abundance of crab. AR 6. In light of those factors, it made a reasoned decision that adjusting harvest shares to roughly 50/50 while maintaining a relatively stable inflation-adjusted *ex vessel* value for the commercial sector was a reasonable approach to this fishery that would give all segments reasonable access and harvest opportunity.

The commercial crabbers argue that DFW should have forecast further into the future and predicted what might happen even farther out in time. They claim that failing to do so abandons management of the fishery. Br. of Appellant at 44. But DFW explained the significant uncertainty associated with predicting future fishery outcomes. AR 15-16. Both DFW’s crab policy and its rule explanation commit to annual

reviews of both the commercial and recreational harvest to see if future changes are needed.<sup>16</sup> AR 2, 7. Careful predictions about the future combined with review and changes in management as needed is the hallmark of responsible adaptive management.

The commercial crabbers also complain that identified problems in the recreational sector's compliance with reporting and conservation requirements will increase with an additional weekend day of harvest.<sup>17</sup> However, it fails to discuss the numerous adjustments and programs the Department implemented in response to the compliance issue. AR 2, 10-14. The crabbers advocate a response that penalizes all recreational harvesters for the actions of some (an approach they have not suggested for their own sector). Their advocacy of an alternative policy choice does not demonstrate that DFW was arbitrary and capricious. DFW simply chose to employ more targeted responses to address non-compliance; it provided a reasoned explanation of its response to compliance issues and did not proceed in a manner that willfully ignored either the issue or the record developed in the rule-making process.

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<sup>16</sup> Department staff has already conducted a review of the outcomes this past year for the Puget Sound recreational and commercial Dungeness crab fishery and reported to the Commission. The information is publicly available at: [http://wdfw.wa.gov/fishing/commercial/crab/pugetsound/historic\\_landings.html](http://wdfw.wa.gov/fishing/commercial/crab/pugetsound/historic_landings.html). (last visited 3/2/12)

<sup>17</sup> The commercial crabbers conveniently ignore the reality that compliance issues are present in all fisheries – recreational, commercial, and tribal. AR at 11.

**b. DFW's consideration of the "TCW study" was for a limited purpose and reflects appropriate consideration of a large record of materials.**

The commercial crabbers criticize the Department's consideration of a study the State commissioned to evaluate the economic benefits of recreational and commercial fisheries in Washington. The Economic Analysis of the Non-Treaty Commercial and Recreational Fisheries in Washington State (TCW Economics, December 2008) (hereafter TCW study) reviewed state fisheries in 2006 and ultimately concluded that "commercial and recreational fisheries not only contribute employment and personal income, but also contribute in several other significant ways to Washington's economy, as well as to its residents' quality of life." AR 1484.

The study is no more than a broad overview of the economic value associated with the State's recreational and commercial fisheries and acknowledges that "it is not sufficiently comprehensive and the values are not estimated with adequate precision to warrant a comparative analysis of the two fisheries." *Id.* Based upon that stated limitation, the crabbers contend DFW's rule is invalid because the agency considered the report as a part of its deliberation over the summer recreational rule and the predicted harvest sharing that rule would produce between the recreational and commercial sectors. Br. of Appellant at 45.

The crabbers ignore the explanation provided in the CES – that DFW was fully cognizant of the TCW study’s limitations and made sure its use of the study in its rulemaking deliberations was consistent with those limitations. AR 16. For example, because RCW 77.04.012 considers both recreational and commercial interests, DFW referred to the report for the conclusion that increasing recreational harvest is likely to have positive economic impacts. AR 16, 1098. In a world of competing objectives, there is nothing arbitrary and capricious about recognizing that while there may be negative impacts to commercial harvesters, there will be positive economic impacts associated with increasing recreational harvest. No attempt was made to quantify offsetting economic impacts because the agency realized that the amount of positive impact is uncertain. The observation that positive impacts are likely consequences of recreational fisheries was, therefore, nothing more than another piece of information to be evaluated and considered.

The superior court reviewed DFW’s consideration of the TCW study, found that it was limited in nature, and concluded DFW did not willfully disregard the record as a whole. VRP at 49-50, Oct. 7, 2011.

The remaining complaints about the manner in which DFW conducted its economic impact analysis are no more than a litany of the commercial crabbers’ preferences for material that should have been

gathered or studies that should have been performed. However, the APA does not require DFW to gather specific information or conduct studies. It requires the agency to carefully consider a rulemaking record. RCW 34.05.325, .335(2), .370. DFW spent nine months soliciting information from the public and from all affected persons, and the commercial crabbers had ample opportunity to bring information and studies to DFW's attention. DFW did not willfully ignore any information in the rulemaking record, and the crabbers have identified no evidence to the contrary.

The commercial crabbers cite *Puget Sound Harvesters Ass'n v. Wash. State Dep't of Fish and Wildlife*, 157 Wn. App. 935, 239 P.3d 1140 (2010), in an attempt to support their argument that DFW is duty-bound to preserve a set allocation for commercial harvesters and protect that allocation by capping the catch by recreational harvesters at a specified level. The holding in *Puget Sound Harvesters* does not require the kind of rulemaking activity or outcome demanded by the Appellants.

In *Puget Sound Harvesters*, the court reviewed a rule opening the commercial chum salmon fishery in Region 10. The rule implemented a different Commission policy utilizing six management objectives arranged in order of priority, including a restatement of the objectives set forth in RCW 77.04.012. *Puget Sound Harvesters*, 157 Wn. App. at 940. In

pursuing those objectives, DFW decided to allocate harvest opportunity based upon fishing time rather than an allocation of pounds of fish caught.

The court rejected the commercial harvesters' contention that they were entitled to any specific allocation of chum. *Id.* at 946 n.4. Although the court concluded that DFW could rationally allocate opportunity rather than actual catch, *id.* at 944, it found the rule arbitrary and capricious because DFW failed to consider detailed information it had about gear efficiency that would have allowed it to estimate catch produced by fishing time. *Id.* at 950-51. More specifically, the court concluded that, on the rulemaking record, DFW's stated allocation objectives regarding harvest opportunity could only be met by considering the two factors most directly related to harvest output for these two commercial sectors – time on the water and gear efficiency. The court found that allocation of time alone, without an estimate of the harvest outcome produced by that time on the water, provided an insufficient basis to estimate the outcomes likely to be produced. *Id.*

The lesson taught by that case is that DFW has the discretion to establish reasonable fishery objectives. However, once established, the agency must consider those objectives and use available information in the record that is relevant to an estimation of the objectives. The court specifically rejected claims by one of the commercial sectors that a

specific allocation is what is needed to meet the objectives of RCW 77.04.012. DFW has discretion to set or change allocations, as long as it reasonably considers available facts and circumstances in the record.

In the present case, DFW established general policy objectives for the Puget Sound crab fishery under RCW 77.04.012 to increase the harvest opportunity for recreational fishers to accommodate their increasing demographic presence, while also conserving the resource, maintaining the economic stability and well-being of the fishery industry (considering both commercial and recreational aspects), and enhancing and improving recreational and commercial fishing within the State. AR 1-3. Balancing these objectives requires some compromise because they are in tension. For example, increased harvest responds to social and economic interests, but increases conservation concerns. Similarly, more harvest for one group means less harvest for another. There is no simple formula that will produce a uniquely identifiable outcome, and RCW 77.04.012 sets no formula and requires no specific allocation. It allows DFW to collect and evaluate information and make judgments based on broad policy considerations.

As required by *Puget Sound Harvesters*, DFW utilized available information to predict catch outcomes and economic impact. AR 14-17. It then used this information to arrive at a reasoned judgment to implement

the general objectives set forth in its policy statement - to “promote a healthy and sustainable population of Dungeness crab in Puget Sound,” and “provide for meaningful and stable recreational and commercial fisheries and to focus the commercial fishery in the areas where the crab abundance is the greatest.” AR 1. No more is required.

Ultimately, the commercial crabbers’ perspective on how the Puget Sound crab fishery should be shared is clear – do nothing to diminish their share. That self interest is understandable, but it has no statutory basis. They reject any consideration of social or economic factors applicable to the recreational fishery, entirely subordinating it to their own interests. At bottom, their complaint is that DFW did not adopt the allocation they advocated. Constructing an alternate hypothesis for fishery outcomes is simply not sufficient to support their claim that DFW acted arbitrarily and capriciously when it amended WAC 220-56-330. *See Rios*, 145 Wn.2d at 501 (a rule cannot be challenged on the ground that there is an allegedly superior analytical outcome).

**C. Attorney Fees and Expenses**

The commercial crabbers request attorney fees and other expenses under the Equal Access to Justice Act (EAJA), RCW 4.84.350. Their request should be denied if this Court affirms the decision of the trial court

upholding the Department's rule. In that circumstance, they will not have prevailed in this matter. RCW 4.84.350(1).

If this Court were to invalidate the challenged agency rule based upon a conclusion that DFW misinterpreted and applied RCW 77.04.012, this Court should deny the request for fees and expenses because DFW was substantially justified in its legal interpretation.

EAJA authorizes an award of fees and expenses to a qualified party that prevails in a judicial review of agency action "unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." RCW 4.84.350(5). Put another way, fees and expenses are awarded only to parties with a net worth under the statutory threshold who successfully defend against "unreasonable agency action." *Silverstreak, Inc. v. Wash. State Dep't. of Labor and Indus.*, 159 Wn.2d 868, 902, 154 P.3d 891 (2007). Agency action is substantially justified, even if incorrect, where there is room for a reasonable person to reach the same conclusion as the agency. *Id.*

When an agency can demonstrate that it relied on statutory authority, legislative intent, and case precedent, state courts have been inclined to find the agency's actions substantially justified. *Silverstreak*, 159 Wn.2d at 892 (State must show its position had a reasonable basis in law and fact); *Alpine Lakes Protection Soc'y v. Wash. State Dep't of*

*Natural Res.*, 102 Wn. App. 1, 19, 979 P.2d 929 (1999) (same), citing *Pierce v. Underwood*, 487 U.S. 552, 563-65, 108 S. Ct. 2541 (1988).

In this case, WDFW was substantially justified in its actions. As this brief shows, RCW 77.04.012 provides DFW with substantial discretion to choose how to structure and manage various fisheries. No statute requires that WDFW allocate the fisheries in the manner demanded by the commercial crabbers. In fact, the case law construing the statutory scheme confirms that state licensed fishers are not entitled to a guaranteed share of the catch. *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 948 n.5, 603 P.2d 819 (1979). Furthermore, the legislature explicitly amended RCW 77.04.012 in 1983 by removing the word commercial from the phrase “fishing industry.” Accordingly, a reasonable person could have relied on these statutes and cases that are counter to the commercial crabbers’ argument that DFW had a duty to maintain their historical harvest share and must consider only commercial interests, not recreational interests, when considering the economic well being and stability of the fishing industry in its rulemaking.

If the Court nevertheless were to conclude that DFW was not substantially justified in its actions, we ask that the issue of fees and expenses under EAJA be remanded back to the superior court for fact finding regarding respondents’ status as qualified parties. This case was

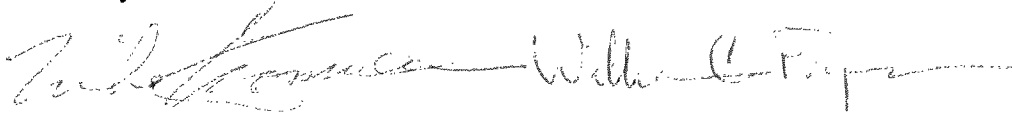
tried as a record review under the APA. Probing the merits of an award under EAJA requires the opportunity to conduct discovery and present evidence to the superior court.

#### IV. CONCLUSION

The Department respectfully asks this Court to affirm the superior court's conclusion that the agency acted lawfully and did not act arbitrarily and capriciously. The commercial crabbers' request for attorney's fees should be denied.

RESPECTFULLY SUBMITTED this 2nd day of March, 2012.

ROBERT M. MCKENNA  
Attorney General

Handwritten signatures of Michael S. Grossmann and William C. Frymire in cursive ink.

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# **Appendix 1**

AMENDATORY SECTION (Amending Order 10-64, filed 3/19/10, effective 5/1/10)

**WAC 220-56-330 Crab--Areas and seasons.** (1) It is unlawful to fish for or possess crab taken for personal use from Puget Sound except during the following seasons:

(a) Marine Area 4 east of the Bonilla-Tatoosh line, and Areas 5, 6, 8-1, 8-2, 9, 10, 11, 12, and 13(~~(---)~~): Open 7:00 a.m., (~~(June 18 through the last day in February)~~) July 1 through Labor Day, Thursday through Monday of each week.

(b) ~~Those waters of ((Area 6, those waters of))~~ Marine Area 7 south and west of a line projected from Village Point, Lummi Island, through the navigation buoy just east of Matia Island, thence to the buoy at Clements Reef, thence to the easternmost point of Patos Island, thence running along the northern shore of Patos Island to the westernmost point of Patos Island, thence due west to the international boundary(~~(; westerly of a straight line from the northernmost tip of Sinclair Island through Lummi Rocks to Lummi Island; and west of a line projected from the southeast point of Sinclair Island to the ferry dock at Shannon Point, and waters of Areas 8-1, 8-2, 9, 10, 11 and 12--))~~) and south of a line that extends from Point Francis on Portage Island, through the marker just north of Inati Bay on Lummi Island to Lummi Island: Open 7:00 a.m. (~~(July 1 through September 3, open only Wednesday through Saturday of each week and open Sunday, September 5 and Monday, September 6.~~

~~(c) Those contiguous waters of Marine Area 7 north, south and east of a line that extends from Point Francis on Portage Island, through the marker just north of Inati Bay on Lummi Island to Lummi Island, and a line that extends from the Anacortes ferry dock at Shannon Point, northward to the southeastern tip of Sinclair Island, thence from the northernmost tip of Sinclair Island through Lummi Rocks to Lummi Island (southeast Hale Pass, Bellingham Bay, Samish Bay, Padilla Bay, eastern waters of Bellingham Channel, Guemes Channel and Fidalgo Bay) - Open 7:00 a.m. July 16 through September 30, and open only Wednesday through Saturday except also open Sunday, September (5) and Monday, September 6)), July 15 through September 30, Thursday through Monday of each week.~~

~~((d))~~ (c) Those waters of Marine Area 7 north and east of a line projected from Village Point, Lummi Island through the navigation buoy just east of Matia Island thence to the buoy at Clements Reef thence to the easternmost point of Patos Island, running along the northern shoreline of Patos Island and from the westernmost point of Patos Island due west to the international boundary and north of a line that extends from Point Francis on Portage Island, through the marker just north of Inati Bay on Lummi Island to Lummi Island(~~(---)~~): Open 7:00 a.m. August (~~(17)~~) 15 through September 30, (~~(and open only Wednesday)~~) Thursday through

~~((Saturday)) Monday of each week ((except also open Sunday, September 5 and Monday, September 6)).~~

(2) It is unlawful to fish for or possess crab taken for personal use with shellfish pot gear from Marine Areas 1, 2, 3, and Area 4 west of the Bonilla-Tatoosh line except during the period from December 1 through September 15. Open to gear other than shellfish pot gear year-round.

(3) The Columbia River upstream from a line projected from the outermost end of the north jetty to the exposed end of the south jetty is open to crab fishing for personal use year-round.

## WAC 220-56-330

## Crab — Areas and seasons.

(1) It is unlawful to fish for or possess crab taken for personal use from Puget Sound except during the following seasons:

(a) Marine Area 4 east of the Bonilla-Tatoosh line, and Areas 5, 6, 8-1, 8-2, 9, 10, 11, 12, and 13: Open 7:00 a.m., July 1 through Labor Day, Thursday through Monday of each week.

(b) Those waters of Marine Area 7 south and west of a line projected from Village Point, Lummi Island, through the navigation buoy just east of Matia Island, thence to the buoy at Clements Reef, thence to the easternmost point of Patos Island, thence running along the northern shore of Patos Island to the westernmost point of Patos Island, thence due west to the international boundary and south of a line that extends from Point Francis on Portage Island, through the marker just north of Inati Bay on Lummi Island to Lummi Island: Open 7:00 a.m., July 15 through September 30, Thursday through Monday of each week.

(c) Those waters of Marine Area 7 north and east of a line projected from Village Point, Lummi Island through the navigation buoy just east of Matia Island thence to the buoy at Clements Reef thence to the easternmost point of Patos Island, running along the northern shoreline of Patos Island and from the westernmost point of Patos Island due west to the international boundary and north of a line that extends from Point Francis on Portage Island, through the marker just north of Inati Bay on Lummi Island to Lummi Island: Open 7:00 a.m. August 15 through September 30, Thursday through Monday of each week.

(2) It is unlawful to fish for or possess crab taken for personal use with shellfish pot gear from Marine Areas 1, 2, 3, and Area 4 west of the Bonilla-Tatoosh line except during the period from December 1 through September 15. Open to gear other than shellfish pot gear year-round.

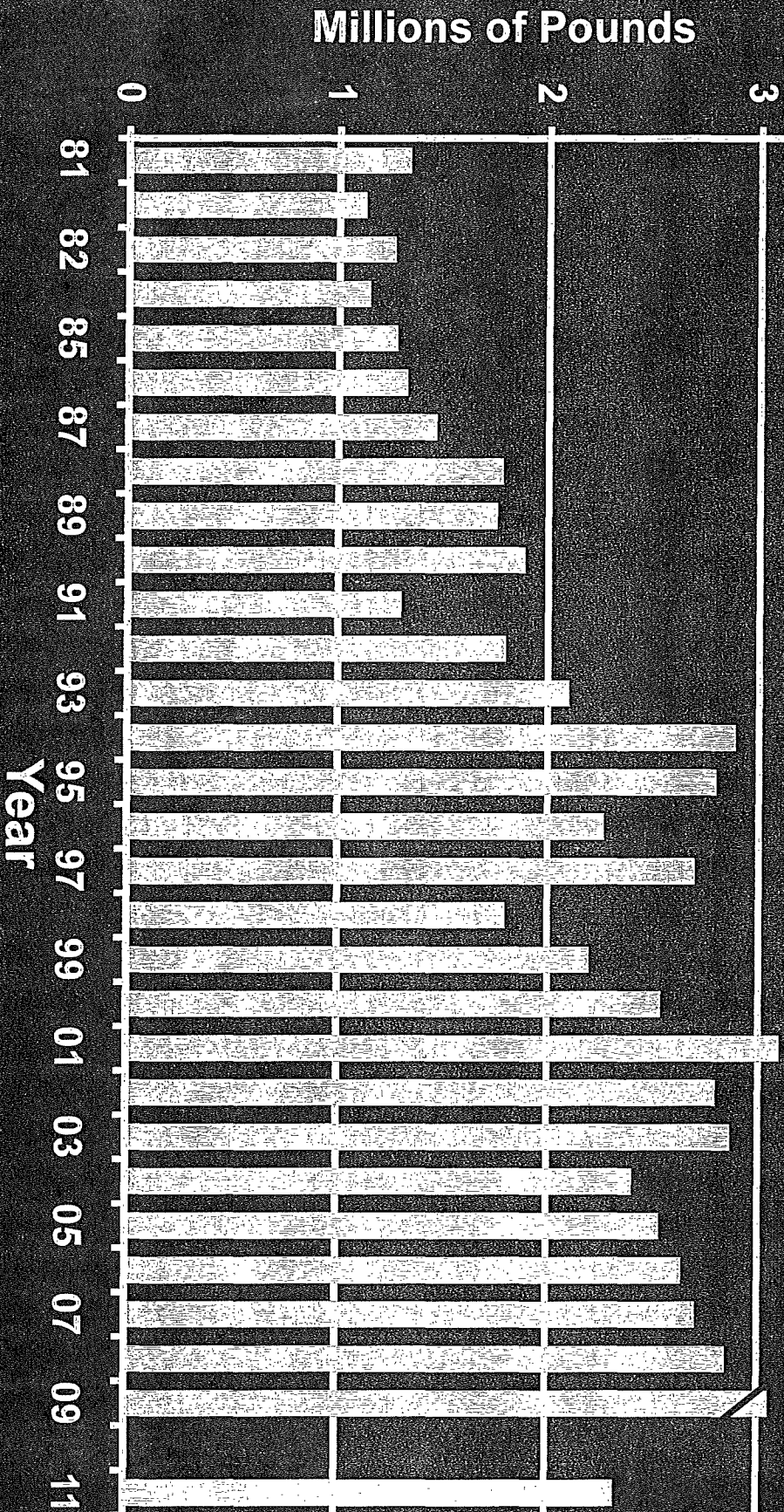
(3) The Columbia River upstream from a line projected from the outermost end of the north jetty to the exposed end of the south jetty is open to crab fishing for personal use year-round.

[Statutory Authority: RCW 77.04.012, 77.12.045, and 77.12.047. 11-09-016 (Order 11-29), § 220-56-330, filed 4/11/11, effective 5/12/11. Statutory Authority: RCW 77.12.047. 10-07-105 (Order 10-64), § 220-56-330, filed 3/19/10, effective 5/1/10; 05-12-007 (Order 05-102), § 220-56-330, filed 5/19/05, effective 6/19/05; 05-05-035 (Order 05-15), § 220-56-330, filed 2/10/05, effective 5/1/05; 04-07-009 (Order 04-39), § 220-56-330, filed 3/4/04, effective 5/1/04; 01-06-036 (Order 01-24), § 220-56-330, filed 3/5/01, effective 5/1/01. Statutory Authority: RCW 75.08.080, 77.12.040. 00-08-038 (Order 00-29), § 220-56-330, filed 3/29/00, effective 5/1/00; 99-08-029 (Order 99-13), § 220-56-330, filed 3/30/99, effective 5/1/99; 98-06-031, § 220-56-330, filed 2/26/98, effective 5/1/98. Statutory Authority: RCW 75.08.080. 97-07-078 (Order 97-53), § 220-56-330, filed 3/19/97, effective 5/1/97; 96-11-078 (Order 96-44), § 220-56-330, filed 5/13/96, effective 6/13/96; 93-08-034 (Order 93-20), § 220-56-330, filed 3/31/93, effective 5/1/93; 90-06-026, § 220-56-330, filed 2/28/90, effective 3/31/90; 86-09-020 (Order 86-08), § 220-56-330, filed 4/9/86; 85-09-017 (Order 85-20), § 220-56-330, filed 4/9/85; 84-09-026 (Order 84-22), § 220-56-330, filed 4/11/84; 80-03-064 (Order 80-12), § 220-56-330, filed 2/27/80, effective 4/1/80. Formerly WAC 220-56-082.]

# **Appendix 2**

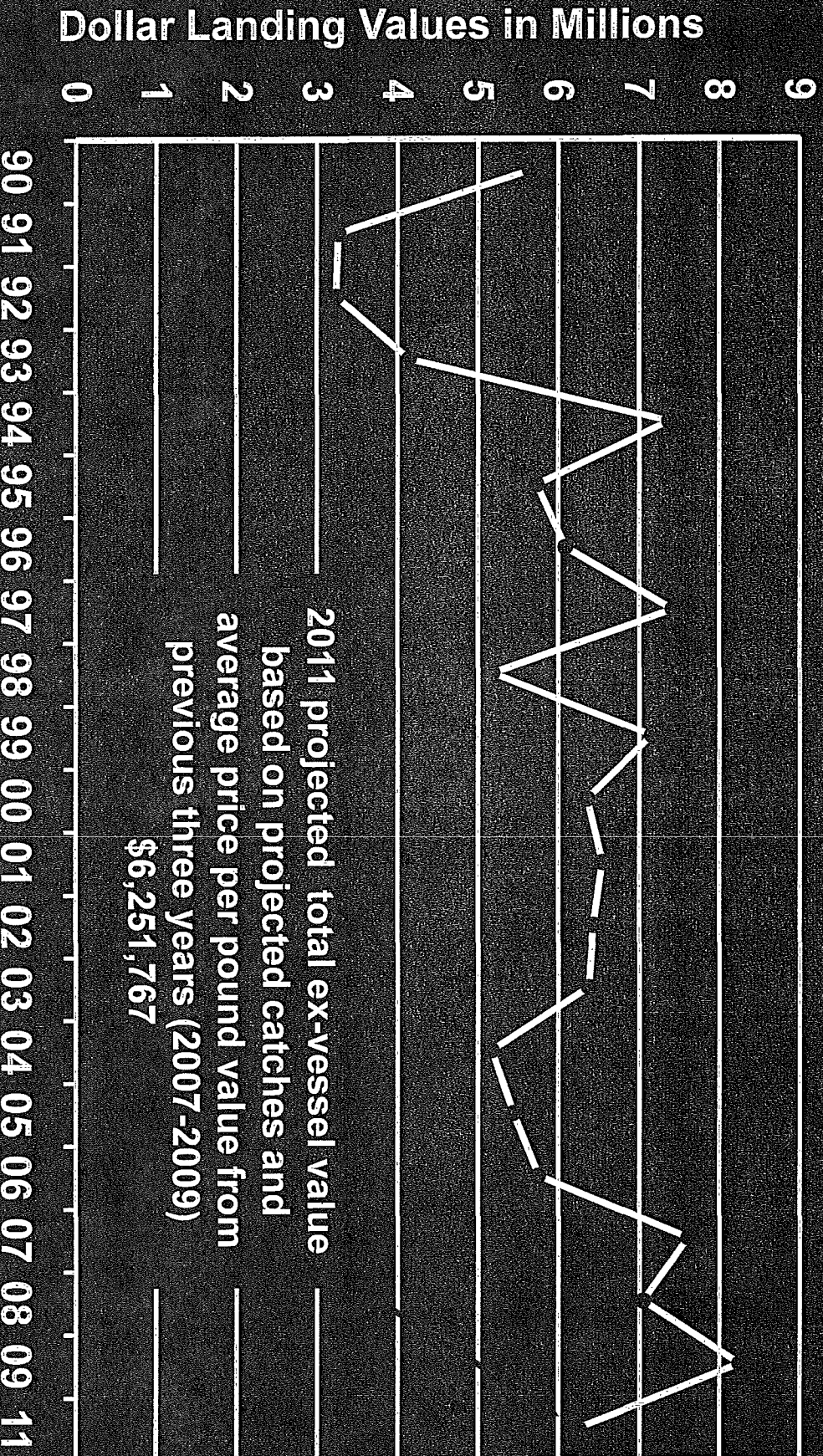
# 1981-2009 Commercial Dungeness Crab Catch and Projected Catch Decrease Resulting from the Proposed Rule Change

2005-2009 Average commercial catch 2,766,034 pounds  
2011 Projected commercial catch 2,324,077 pounds  
Projected catch decrease 441,957



# **Total Adjusted Ex-Vessel Landing Values for the Puget Sound Commercial Crab Fishery (1990-2009 actual) (2011 projected)**

Ex-vessel values were adjusted to 2010 dollars using a Consumer Price Index (CPI) conversion maintained by the United States Department of Labor Statistic



Season

# **Appendix 3**

## RCW 77.04.012

## Mandate of department and commission.

Wildlife, fish, and shellfish are the property of the state. The commission, director, and the department shall preserve, protect, perpetuate, and manage the wildlife and food fish, game fish, and shellfish in state waters and offshore waters.

The department shall conserve the wildlife and food fish, game fish, and shellfish resources in a manner that does not impair the resource. In a manner consistent with this goal, the department shall seek to maintain the economic well-being and stability of the fishing industry in the state. The department shall promote orderly fisheries and shall enhance and improve recreational and commercial fishing in this state.

The commission may authorize the taking of wildlife, food fish, game fish, and shellfish only at times or places, or in manners or quantities, as in the judgment of the commission does not impair the supply of these resources.

The commission shall attempt to maximize the public recreational game fishing and hunting opportunities of all citizens, including juvenile, disabled, and senior citizens.

Recognizing that the management of our state wildlife, food fish, game fish, and shellfish resources depends heavily on the assistance of volunteers, the department shall work cooperatively with volunteer groups and individuals to achieve the goals of this title to the greatest extent possible.

Nothing in this title shall be construed to infringe on the right of a private property owner to control the owner's private property.

[2000 c 107 § 2; 1983 1st ex.s. c 46 § 5; 1975 1st ex.s. c 183 § 1; 1949 c 112 § 3, part; Rem. Supp. 1949 § 5780-201, part. Formerly RCW 75.08.012, 43.25.020.]

## Notes:

State policy regarding improvement of recreational salmon fishing: See note following RCW 77.65.150.

# **Appendix 4**

<u>Oncorhynchus keta</u>	<u>Chum salmon</u>
<u>Oncorhynchus gorbuscha</u>	<u>Pink salmon</u>
<u>Oncorhynchus nerka</u>	<u>Sockeye salmon</u>

(15) "Commercial" means related to or connected with buying, selling, or bartering. Fishing for food fish or shellfish with gear unlawful for fishing for personal use, or possessing food fish or shellfish in excess of the limits permitted for personal use are commercial activities.

(16) "To process" and its derivatives mean preparing or preserving food fish or shellfish.

(17) "Personal use" means for the private use of the individual taking the food fish or shellfish and not for sale or barter.

(18) "Angling gear" means a line attached to a rod and reel capable of being held in hand while landing the fish or a hand-held line operated without rod or reel to which are attached no more than two single hooks or one artificial bait with no more than four multiple hooks.

Sec. 5. Section 3, chapter 112, Laws of 1949 as amended by section 1, chapter 183, Laws of 1975 1st ex. sess. and RCW 75.08.012 are each amended to read as follows:

((It shall be the duty and purpose of)) The department ((of fisheries to)) shall preserve, protect, perpetuate and manage the food fish and shellfish in ((the waters of the)) state waters and ((the)) offshore waters ((thereof to the end that such food fish and shellfish shall not be taken, possessed, sold or disposed of at such times and in such manner as will impair the supply thereof. For the purpose of conservation, and)).

The department shall conserve the food fish and shellfish resources in a manner that does not impair the resource. In a manner consistent ((there-with;)) with this goal, the department shall seek to maintain the economic well-being and stability of the ((commercial)) fishing industry in the state ((of Washington)). The department shall promote orderly fisheries and shall enhance and improve recreational and commercial fishing in this state.

Sec. 6. Section 10, chapter 207, Laws of 1953 and RCW 75.08.014 are each amended to read as follows:

The director of fisheries shall ((have charge and general supervision)) supervise the administration and operation of the department of fisheries((; and shall exercise all the powers)) and perform ((all)) the duties prescribed by law ((with respect to food fish and shellfish)). The director may appoint and employ necessary personnel. The director may delegate, in writing, to department personnel the duties and powers necessary for efficient operation and administration of the department.

((No person shall be eligible to appointment as, or to hold the office of, director of fisheries, unless he has)) Only persons having general knowledge of the fisheries resources and commercial and recreational fishing ((conditions and of the fishing)) industry in this state((; and has no)) are eligible

NO. 42718-4-II

**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

PUGET SOUND CRAB  
ASSOCIATION, et al.,

Appellants,

v.

STATE OF WASHINGTON, and  
DEPARTMENT OF FISH AND  
WILDLIFE,

Respondents.

CERTIFICATE OF  
SERVICE

THURSTON COUNTY  
SUPERIOR COURT  
CAUSE NO. 11-2-00578-7

Pursuant to RCW 9A.72.085, I certify that on the 2nd day of March, 2012, I caused a true and correct copy of Respondents State of Washington's and Department of Fish and Wildlife's Response to Brief of Appellants and this Certificate of Service to be served upon the parties herein as indicated below.

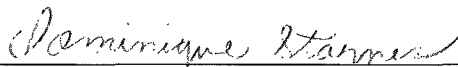
***Via First Class United States Mail, postage fully prepaid,  
and addressed to the following:***

Cleveland Stockmeyer  
Cleveland Stockmeyer PLLC  
8056 Sunnyside Avenue North  
Seattle, Washington 98103

Duncan C. Turner  
Badgley-Mullins Law Group PLLC  
701 Fifth Avenue, Suite 4750  
Seattle, Washington 98104

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 2nd day of March, 2012, at Olympia, Washington.

  
\_\_\_\_\_  
Dominique P. Starnes  
Legal Assistant

# WASHINGTON STATE ATTORNEY GENERAL

**March 02, 2012 - 4:39 PM**

## Transmittal Letter

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# WASHINGTON STATE ATTORNEY GENERAL

**March 02, 2012 - 4:42 PM**

## Transmittal Letter

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